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85-1129

In The

Supreme Court of the United States

October Term, 1985

PAUL E. JOHNSON,

Petitioner,

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

— AND APPENDIX —

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QUESTION PRESENTED

May a public employer lawfully promote a less-qualified female candidate over a more-qualified male employee allegedly pursuant to an affirmative action plan adopted solely to eliminate a statistical disparity in the work force, unrelated to sex discrimination?

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The opinion and order of which review is sought is reported as *Johnson v. Transportation Agency, Santa Clara County, California,* 748 F.2d 1308 (9th Cir. 1984), appearing at pages 17a-47a of the Appendix. The denial of rehearing and modification of opinion appear at pages 48a-52a of the Appendix. The judgment, findings of fact and conclusions of law of the district court are unpublished, but are reproduced at pages 1a-16a of the Appendix.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered judgment against Petitioner on December 4, 1984. Rehearing was sought but denied on September 5, 1985. By order of the Circuit Justice, the Honorable William H. Rehnquist, the time for the filing of this Petition was extended from December 4, 1985, to and including January 3, 1986.

This Court's jurisdiction arises pursuant to 28 U.S.C. § 1254(1) (1976), in that the decision of the Ninth Circuit creates a conflict in the decisional law of the circuits.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This action is based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982).[1] The applicable provision states in part:

[1]This case was pleaded and tried by general reference to Title VII, 42 U.S.C. § 2000e *et seq.* (1982). For the convenience of the Court, only one section is reproduced herein.

§ 2000e-2. Discrimination because of race, color, religion, sex, or national origin

(a) Employers. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C. § 2000e-2(a)(1) (1982).

STATEMENT OF THE CASE

I. Facts And Background

Petitioner Paul E. Johnson was denied a promotion solely on account of his sex, pursuant to the affirmative action plan adopted by Respondent, the Santa Clara County Transportation Agency (Agency). The Agency's affirmative action plan, dated December 18, 1978, is voluntary and non-collectively bargained, covering all phases of employment. The plant was adopted to remedy a statistical imbalance in the Agency's work force, although no discrimination has ever occurred.[2] The plan incorporates no quotas, instead adopting a long-range goal of attaining a work force comprised of 36.4% women, minorities and handicapped persons, the same percentage as is represented in the countywide work force. The plan has no termination date.

[2]Figures in the plan showed that 100% of the individuals in the skilled-craft worker category were men, including both Road Dispatcher positions. [App. 19a, 26a, 27a.]

Johnson is a 60 year-old white male, who has been employed by the Transportation Agency since 1967. In 1974, Johnson applied to be a Road Dispatcher. He placed second on the merit eligibility list but was not appointed. Thereafter, Johnson requested a voluntary demotion to Road Maintenance Worker II to increase his experience and opportunities for promotion within the Agency. A Road Dispatcher position opened in December 1979, and Johnson, then 54, once again applied. [App. 18a.]

In April 1980, a two-member board interviewed all of the applicants, and seven of the nine applicants, including Johnson, scored the required 70 and were placed on the merit eligibility list. Johnson scored 75, placing second. Ms. Diane Joyce, the individual ultimately promoted, scored third with 72.5 points, rounded up to 73. [*Id.*] Members of the Agency's Road Division conducted a second oral interview with each applicant on the list. The second oral board determined that Johnson was the best qualified candidate[3] and unanimously recommended that he be promoted. [App. 19a.] Joyce still ranked third after the second interview.

During the selection process, Joyce contacted the County's Women's Coordinator, Ms. Helena Lee, because she, Joyce, understood that Johnson was to be appointed. Lee told Mr. Victor Morton, the Agency's Affirmative Action Coordinator, about Joyce's application, and Mor-

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[3]Paul Johnson had experience as a temporary Road Dispatcher for the Agency and had worked in a similar position for a private company before his employment by the County. Joyce also had experience as a Road Yard Clerk, Road Maintenance Worker, and a part-time Road Dispatcher.

ton recommended to Mr. James Graebner, the Director of the Transportation Agency, that [illegible] be promoted because she was the only applic[illegible]hin a "protected class." [App. 19a.] Graebner testified that he knew Johnson had "placed top," but he thought both Joyce and Johnson were capable. However, Graebner conceded, when examined as an adverse witness, that he did not inspect the applications or the documentation, nor was he concerned with the make-up of the test. [App. 3a, 12a.] Graebner decided to promote Joyce to the position. Although Graebner had made appointment decisions in other divisions, this was the first and only time Graebner personally made a promotion decision within the Roads Operation Division.

No one has disputed that both the oral boards and the examination process were fair and in accord with the Merit System Rules.[4] Instead of following the recommendations, however, Graebner decided to promote Joyce because of her sex, and he used the Agency's affirmative action plan as the rationale for doing so.

Following Joyce's promotion, Johnson filed a complaint with the E.E.O.C. and received a right-to-sue letter in 1981. Thereafter, he filed his complaint in federal district court, charging the Agency with discrimination based

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[4]Section 700 of the County Charter, adopted pursuant to the California State Constitution, specifies that promotions in administrative services of the County shall conform with Merit System Rules and all applicable law, including those pertaining to the effectuation of equal employment opportunities and affirmative action programs. The Charter further provides that no county employee shall be unlawfully discriminated against because of sex.

on sex. He argued that the Agency's decision to promote a less-qualified woman violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* [App. 20a.]

II. Decisions Below

A. The District Court's Decision

The federal district court for the Northern District of California ruled that Johnson had suffered illegal discrimination because of his sex, in violation of Title VII. *Johnson v. Transportation Agency*, No. C-81-1218-WAI (SJ) (N.D. Cal. July 23, 1982) [App. 1a-16a]. Based upon the testimony of Petitioner and several Agency officials, the court found that Johnson was more qualified for the dispatcher position than Joyce, and but for his sex Johnson would have been promoted to the position. [App. 13a.] The court also found that, but for her sex, Joyce would not have been promoted.

The Agency attempted to rebut this *prima facie* showing by asserting that the affirmative action plan was a valid means of eradicating past discrimination. However, Graebner testified that, to his knowledge, no woman had filed a complaint alleging discrimination before 1978, the year the plan was adopted. Nor did the plan identify any past discriminatory practices to be remedied. In addition, Graebner testified that the affirmative action plan was permanent, and although it provides for yearly reviews, no such yearly reviews have ever been conducted.

Based on these facts, the district court ruled that the Agency failed to show any discrimination in employment that would support the use of the affirmative action

plan and ruled that the County failed to establish the validity of the plan when tested against *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979). First, the court determined that the plan was not temporary.

> There is nothing within the county plan . . . which is consistent with any temporary remedial purposes. Rather, it contains 82 full pages of instruction pertaining to the annual, ongoing and apparently perpetual maintenance of a balanced work force by means of the utilization of an affirmative action plan.

[App. 8a.]

While the district court's decision turned on the permanence of the plan, the court also expressed considerable doubt that the plan had any remedial purpose. [App. 8a-9a.] The Court found, as a matter of fact, that the Agency has not discriminated in the past, and does not now discriminate against women in employment opportunities in general, and promotions in particular. [App. 13a.]

The court held, as a matter of law, that Johnson's rights were unnecessarily trammeled and the action had the effect of creating an absolute bar to his promotion to the position of Road Dispatcher. [App. 14a.] As a remedy, the court ordered the immediate, retroactive promotion of Johnson, as well as back pay and costs, and enjoined the Agency from further discrimination against him. [App. 15a.] The Transportation Agency appealed from the judgment.[5]

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[5]The Service Employees International Union Local 715 intervened in the action and participated in the appeal as an Intervenor-Appellant, although the organization is captioned as an Intervenor-Appellee.

B. The Court of Appeal's Decision.

The Ninth Circuit Court of Appeals reversed, holding that "the district court adopted an overly restrictive view of *Weber*." *Johnson v. Transportation Agency*, 748 F.2d 1308, 1311 (9th Cir. 1984) [App. 17a-47a]. The Ninth Circuit did not reverse the findings of fact, but held as a matter of law that "[i]mplicit in the plan is the intent to stop taking sex into account once the long-range percentage goals are attained." [App. 25a.] Although the plan contains no end-goal or termination date, the Ninth Circuit concluded that "the agency plan is sufficiently temporary." [App. 25a.]

Second, and more importantly, the Ninth Circuit held that "an employer need not show its own history of purposeful discrimination" in order to justify an affirmative action plan. Rather, "[i]t is sufficient for the employer to show a conspicuous [statistical] imbalance in its work force." [App. 26a.]

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE NINTH CIRCUIT IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH SEVENTH CIRCUIT PRECEDENT AND PRECEDENT ESTABLISHED BY THIS COURT.

A. Decisions Of The Ninth And Seventh Circuits Are In Direct Conflict.

The Ninth Circuit's ruling in *Johnson* establishes the principle that a public employer may make sex-based employment decisions under the auspices of an affirmative

action plan adopted in the absence of discriminatory practices. Instead, "[i]t is sufficient for the employer to show a conspicuous [statistical] imbalance in its work force." [App. 26a.]

Thus, Diane Joyce was afforded a remedy for discrimination, i.e., a promotion, even though it was established that neither she nor any other women has suffered from discriminatory treatment at the hands of the County. In fact, Graebner testified that representation of women had increased substantially due to the Agency's efforts. Paul Johnson, on the other hand, has suffered discriminatory treatment, in the guise of affirmative action, and has no remedy unless this Court grants review. According to the Ninth Circuit, a statistical imbalance alone justifies the award of an employment remedy for someone who was never injured by discrimination, and denies any remedy to Johnson who is admittedly the victim of discrimination.

In his dissent [App. 52a], Judge Wallace of the Ninth Circuit correctly noted that this rule of law is in direct conflict with *Janowiak v. Corporate City of South Bend*, 750 F.2d 557 (7th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3896 (U.S. June 10, 1985). In *Janowiak*, the Seventh Circuit had to decide

> whether the City of South Bend could adopt an affirmative action program for its Police and Fire Departments solely upon the basis of a finding that a [statistical] disparity existed. . . .

Id. at 558. The Seventh Circuit concluded "that an employer must proffer more than a finding of a statistical disparity . . . to justify the adoption of an affirmative action program." *Id.* at 562.

These two cases cannot be reconciled nor distinguished. In *Janowiak*, the district court affirmed the validity of the

affirmative action plan adopted "in response to a finding of past discrimination based solely upon a statistical disparity." 750 F.2d at 563. That decision was overturned by the Seventh Circuit "[b]ecause an affirmative action plan must be based upon a finding of past discrimination. . . ." 750 F.2d at 562. In *Johnson,* the Ninth Circuit determined that an affirmative action plan could be upheld based solely on a statistical disparity.

B. The Ninth Circuit's Decision Directly Conflicts With This Court's Decision in United Steelworkers of America v. Weber.

In *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979), this Court set forth the standard for voluntary affirmative action plans. In *Weber,* the voluntary affirmative action plan upheld was based upon discrimination so egregious that the Court could take judicial notice of racial exclusion. *Id.* at 199. Moreover, the plan was "designed to break down old patterns of racial segregation and hierarchy." *Id.* at 208. The plan at issue did not unnecessarily trammel the interests of the white employees, and would end when the existing exclusion of minorities was remedied.

None of these predicates exist here. First, the district court found as a matter of fact and law that no discrimination against women has occurred, based on evidence and testimony presented by the Agency. Instead, the plan is based solely on a statistical disparity. The plan is not intended to break down traditional patterns of exclusion, because exclusionary acts have never occurred. The plan has neither an end date nor criteria to determine the end date. In more than seven years, the percentage goals in the

plan have never been reviewed, nor has any yearly review been completed as the plan requires. Thus, the plan unnecessarily trammels the interests of the male employees because it has no remedial purpose.

CONCLUSION

There is a clear and immediate need for this Court's direction in the lawful formulation and use of affirmative action plans. The dictates of Title VII apply to public and private employers alike, and affect the workforce of the nation. Until this Court provides guidance for determining what is permissible and impermissible under affirmative action, discrimination in the guise of affirmative action will continue. The Court should grant this Petition for Certiorari, and resolve the confusion which exists.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PAUL E. JOHNSON, Plaintiff, v. TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, Defendant.	No. C-81-1218-WAI (SJ) JUDGMENT

This action came duly on for trial before the court sitting without a jury, and having been fully and fairly tried, argued and submitted, and good cause appearing therefore, IT IS ORDERED, ADJUDGED AND DECREED as follows:

(1) That plaintiff have judgment against defendant;

(2) That defendant forthwith appoint plaintiff to the position of Road Dispatcher;

(3) That plaintiff have and recover of defendant the sum of Five Thousand Six Hundred Fifty-Four Dollars and Forty-Eight Cents ($5,654.48), representing all forms of compensation and benefits which plaintiff has not received as the result of his not being appointed to the position of Road Dispatcher in June 1980;

(4) The defendant is enjoined and restrained from discriminatory acts or practices against plaintiff;

(5) That plaintiff is entitled to his reasonable costs of suit; and

(6) That the issue of reasonable attorney's fees will be heard and determined at a time to be set.

DATED: 8-10-82

/s/ William A. Ingram
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PAUL E. JOHNSON, Plaintiff-Appellee, v. TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, Defendant-Appellant,	No. C-81-1218-WAI (SJ) FINDINGS OF FACT AND CONCLUSIONS OF LAW

This preface to the Findings of Fact and Conclusions of Law rendered herein is intended to make as clear as possible my reasons for adopting those Findings and Conclusions.

The evidence preponderates in favor of plaintiff's contention that he is better qualified to be appointed to the position of road dispatcher than is Joyce. In making this finding I have relied upon the testimony of plaintiff, Joyce, Davis, DiBasilio and Beals. Graebner's testimony that the applicants are essentially equal in qualification is not compelling because he appeared to rely primarily upon the posted scores, and did little or nothing to inquire into the results of the interview process and conclusions which Beals described as of critical importance to the selection process.

Based upon the testimony of Graebner, Ex. 13, and the whole chronology of events as described by plaintiff, Joyce and other witnesses, I am satisfied by a preponderance of the evidence that the gender of Joyce was *the determining factor* in her selection.

Admittedly, under merit system rules the appointing authority has discretion in choosing an appointee, so long as such an appointee is on the duly qualified list. Presumably, the exercise of that discretion, if otherwise not limited by law, would allow the appointment of a less qualified person over one better qualified so long as both were included on the qualified list. In the instant case, however, promotion on the basis of gender is a prima facie transgression of Federal law, and to that extent the discretion of the appointing authority must be limited.

The evidence therefore reveals a prima facie case of a Title VII violation. *Teamsters v. Los Angeles,* 431 U.S. 324 (1977); *Harmon v. San Diego County,* 477 F. Supp. 1084 (S.D. Cal. 1979).

The remaining issue in the case, on which defendant has the burden of going forward with the evidence, is whether the preferred treatment accorded Joyce on the basis of her gender is justified on the basis of adherence to the County and Transit District Affirmative Action Plans.

Plaintiff contends as follows:

1) The plans are not temporary measures designed to eliminate manifest racial and gender imbalance but to maintain indefinitely racial and gender

balance. *Cf. United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

2) Defendant has not asserted the good faith defense set forth in 29 C.F.R. § 1608, and in 42 U.S.C. § 2000e-12(b)(1).

3) The plans do not assert that in the past either the County of Santa Clara or the Transportation Agency have ever discriminated against women, and that there is no historical justification sufficient to permit discrimination in favor of minority employees in violation of the rights of non-minority employees. *Cf. Brunetti v. City of Berkeley*, 12 FEP Cases 937, 940.

4) The Transportation Agency Plan was misapplied in this case because the underrepresentation sought to be redressed by the defendant's personnel action did not in fact exist within the job classification in issue.

5) The Transportation Agency Plan was misapplied because the remedial action sought by the agency in this case was not based upon an underrepresentation of women in an EEOC job category, as required by the plan.

Whether the Affirmative Action Plans in issue comply with the requirements of *Weber, supra*, is the starting point for the analysis of this case. Recently the Ninth Circuit in *La Riviere v. Equal Employment Opportunity Commission*, — F.2d — (May 19, 1982, Slip Op. p. 2103), held that *Weber* is applicable to Affirmative Action Plans implemented by a public employer and that gender based

discrimination prohibitions contained in the Civil Rights Act of 1964 prohibit discrimination against men. The *Weber* case as reiterated in *La Riviere* sets forth four standards under which it can be determined whether or not a particular Affirmative Action Plan can be permissably implemented without running afoul of the provisions of Title VII. These are:

1) That the plan was "designed to break down old patterns of racial [gender] segregation and hierarchy";

2) That the plan did not "unnecessarily trammel the interests of the white [male] employees" by requiring their discharge and replacement with new black [female] hirees;

3) That the plan did not "create an absolute bar to the advancement of white [male] employees";

4) That the plan was a "temporary measure . . . not intended to maintain racial [gender] balance but simply to eliminate a manifest racial [gender] imbalance."

Bracketed words supplied.

Compliance with the fourth element is lacking in this case. Before turning to an examination of the plans, it should be noted that Graeber [sic], the director of the Transportation Agency and the county official primarily charged with the development and implementation of the Transportation Agency Plan, testified that he had predicated his decision to appoint Joyce to the position in question on the fact that there had never been a woman road dispatcher, and that he relied on the goals expressed in the agency Affirmative Action Plan in reaching his decision. He stated that the goal of the agency under the plan is to

employ a number of women consistent with the percentage of women who work in the countywide work force (36.4% in 1978), and stated that each and every job category within the agency remains subject to the Affirmative Action Plan whether or not that percentage of female incumbency has been attained. He stated further that the Affirmative Action Plan is a *permanent* part of the agency's operating philosophy and that there is no *specific time table* as to when everyone within the agency will receive an equal opportunity.[1] He said further that the Affirmative Action Plan is not going to end and will continue to be applied.

In *Weber* the plan there in issue was found to be temporary in nature because it would end when the desired percentage of minority employees had been achieved. In *La Riviere* the plan in issue was by its terms limited to two years and was clearly temporary. In *Valentine v. Smith*, 654 F.2d 503 (8th Cir. 1981), the time limited for goad [sic] achievement was four years which was found not to exceed the time substantially necessary for the accomplishment of the goals which were found to be permissably remedial. Generally speaking, a plan should last no longer than reasonably necessary to eliminate a conspicuous imbalance. *Setser v. Novack Investment Co.*, 657 F.2d 961 (8th Cir. 1981).

The burden is on the employer to offer evidence tending to prove the permissable character of its Affirmative Action Plan. *Setser, supra.*

The testimony of Graeber [sic] does not aid the defendant in its burden to prove a *reasonably* temporary duration of the plan as required under the *Weber* standard.

In evidence are Ex. 2, which is the Affirmative Action Plan of the County of Santa Clara as adopted on October

16, 1979; and Ex. 1, which is the Equal Employment Opportunity Affirmative Action Plan adopted by the Transportation Agency of the County of Santa Clara on December 18, 1978.

There is nothing within the County Plan, Ex. 2, which is consistent with any temporary remedial purposes. Rather, it contains 82 full pages of instructions pertaining to the annual, ongoing and apparently perpetual maintenance of a balanced work force by means of the utilization of an Affirmative Action Plan.

In like manner, the provisions of the Agency Plan, Ex. 1, reveal no discrete time period or ultimate goal to be accomplished within a reasonable time from which the Court can infer that the plan is temporary and remedial, as distinguished from ongoing and designed to maintain balanced employment of persons in categories designed to be protected under the plan.

The defendant had the burden in trial to justify adherence to the Affirmative Action Plan within the rubric of *Weber*. It has not done so.

This does not constitute a square holding that the Affirmative Action Palns [sic] in issue are impermissable under Title VII and 29 C.F.R. § 1680 requirements. I hold only that defendant did not sustain its burden of proof in that regard.

Failure to obtain an Opinion from the EEOC as provided in 29 C.F.R. § 680 [sic] and 42 U.S.C. § 2000e-12(b)(1) and to plead and prove good faith reliance on it is not fatal to the defense, and indicates only that defendant did not avail itself of that course. That circumstance gives rise to no inference one way or the other.

There is nothing on the face of Exs. 1 or 2 which tends to show that the adoption of the Affirmative Action Plan

therein contained was prompted by concededly discriminatory practices committed in the past by the County or the Agency as distinguished from generally prevalent societal attitudes. Graebner testified that to his knowledge no woman had filed a complaint alleging discrimination by the Agency prior to 1978. Defendant relies upon the testimony of Joyce to establish certain alleged acts which it contends show a history of discriminatory practices: (1) 1974 printed job announcement. This was referred to by Joyce as containing the masculine pronoun, but it is not in evidence; (2) Statements made to Joyce while she was an accounts clerk to the effect that her supervisor was "looking for a man to do the job." The evidentiary value of this purported statement is substantially diminished by the fact that Joyce got the job, notwithstanding the apparent desire of the supervisor to have a man; (3) There is no evidence in the record that Joyce was denied assignment as a Road Maintenance Worker because she was a woman; (4) The denial of coveralls for a painting assignment on three occasions may be indicative of discriminatory intent on the part of Mr. Baldanzi, but by itself does not constitute adequate proof of historical justification for an Affirmative Action Plan; Myra Beals testified that she handled road grievances and had one from a woman traffic painter who was excluded from a training program. She got the training as a result of exercising the grievance procedure. I do not feel that these incidents tend to show that the plans were adopted to break down "old patterns of segregation and hierarchy." The burden is upon defendant to prove historical justification. Reference to statistics is made to show patterns of discrimination. Whether defendant has carried the burden with respect to the first criterion of *Weber* is not critical, because my decision is

not based on a failure to carry that portion of defendant's burden.

Plaintiff has alleged a misapplication of the Affirmative Action Plan at least partially due to a misclassification of the position of Road Dispatcher. In view of the foregoing, a decision on the point is unnecessary.

Predicated upon and in implementation of the foregoing, the Court now renders its Findings of Fact.

FINDINGS OF FACT

The Court finds that:

1. Plaintiff, Paul E. Johnson, is a male individual who has been employed by defendant since 1967 and is currently employed by defendant in the job category of Road Maintenance Worker II.

2. Defendant, Transportation Agency, Santa Clara County, is a transit district established, maintained, controlled and managed by the County of Santa Clara, which is a political subdivision of the State of California and an employer within the meaning of Title VII of the Civil Rights Act § 2(b), 42 U.S.C. § 2000e(b).

3. Pursuant to the authority granted by the Constitution of the State of California, the County has adopted a charter for the purpose of local self-government. § 700 of the Charter provides *inter alia* that the personnel system of the County shall be based on merit and equal opportunity; that promotions in the administrative service of the County shall be made in conformance with Merit System Rules and all applicable laws, including those pertaining to the effectuation of equal employment opportunities and affirmative action programs; and that no person employed with the County shall be unlawfully discriminated against because of sex.

4. § 701 of the County Charter provides that employment by the County shall be divided into the unclassified and classified service.

5. The position of Road Dispatcher within the Transportation Agency is in the classified service.

6. In December, 1979, a promotional opportunity announcement was posted for the position of Road Dispatcher.

7. Plaintiff and eight other individuals, including Diane Joyce the individual who was ultimately appointed to the position of Road Dispatcher, filled out a written application form.

8. On April 24, 1980, an oral board consisting of two individuals interviewed the nine applicants, seven of whom scored 70 and above and were therefore certified as eligible under the Merit System Rules for the position of Road Dispatcher.

9. Plaintiff scored 75 on the oral board and Diane Joyce scored 72.5, which was rounded up to 73.

10. A second oral board or interview was then conducted by individuals employed within the Road Operations Division of the Transportation Agency. The seven individuals who passed the first oral board participated in the Second departmental oral board. Plaintiff was the individual unanimously recommended by the second oral board to be appointed to the position of Road Dispatcher.

11. During the selection process, Diane Joyce contacted Ms. Helena Lee, Women's Coordinator, Santa Clara County, and informed Ms. Lee of the promotional opportunity and of the fact that she, Diane Joyce, was ranked

fourth on the eligibility list. Ms. Lee then contacted Mr. Victor Morton, then Affirmative Action Coordinator of the Transportation Agency, and informed Mr. Morton that Diane Joyce had applied for the promotion. Ex. 13.

12. Mr. Morton recommended to Mr. James Graebner, Director of the Transportation Agency, that Mr. [sic] Joyce be promoted to the position of Road Dispatcher. Test. of Graebner.

13. Mr. Ronald Shields, Road Operations Division Director of the Transportation Agency, recommended that plaintiff be appointed to the position of Road Dispatcher. Test. of Graebner.

14. Absent Mr. Morton's recommendation, the decision as to whom to promote to the position of Road Dispatcher would have been made by Mr. Shields or his subordinate, Mr. Alan Jones, Road Maintenance Manager. Test. of Graebner.

15. Mr. Graebner appointed Diane Joyce to the position of Road Dispatcher. Test. of Graebner.

16. Mr. Graebner did not inspect the applications and related examination records of either plaintiff or Diane Joyce before making his decision, as he is authorized to do under the Merit System Rules. Test. of Graebner.

17. The examination of [sic] process, including both oral boards, was fair and was in accord with the Merit System Rules.

18. Based upon the examination results and the departmental interview, plaintiff was more qualified for the position of Road Dispatcher than Diane Joyce.

19. But for plaintiff's sex, male, he would have been promoted to the position of Road Dispatcher.

20. But for Diane Joyce's sex, female, she would not have been appointed to the position of Road Dispatcher.

21. Diane Joyce's sex, female, was the substantial determining factor in her appointment to the position of Road Dispatcher.

22. The Transportation Agency has not discriminated in the past, and does not discriminate in the present against women in regard to employment opportunitities in general and promotions in particular.

23. The Equal Employment Opportunity Affirmative Action Plan, Transportation Agency, County of Santa Clara, dated December 18, 1978, was in effect on the date of the promotion at issue and was used as the rationale for appointing Diane Joyce to the position of Road Dispatcher.

24. The Affirmative Action Plan had no end date or other provision which would have the effect of ending preferential treatment to women. Test. of Graebner; Ex. 1; Ex. 2.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

1. Jurisdiction is conferred by 42 U.S.C. § 2000e and by 28 U.S.C. §§ 1331 and 1343(3).

2. Between December, 1979, and June 1980, there was an opening for the position of Road Dispatcher in the Transportation Agency.

3. Based on the selection process as specified in the County Merit System Rules, plaintiff was the most qualified applicant for the position of Road Dispatcher.

4. The defendant's refusal to promote plaintiff to the position of Road Dispatcher was in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(e) *et seq* as amended.

5. The Affirmative Action Plans of the County Transportation Agency and the County of Santa Clara did not justify the failure to promote plaintiff to the position of Road Dispatcher. The defendant has failed to demonstrate that either or both of the plans are a temporary measure intended to eliminate a manifest imbalance in the work force in the Transportation Agency, but instead, were and are interpreted in such a fashion so as to attempt to maintain an ongoing balance.

6. The defendant has failed to demonstrate that the Affirmative Action Plan of the Transportation Agency will end or be modified in any way at any point in time or when the defendant's work force composition as a whole, by department, by EEOC category or defendant's major job classification reaches a certain number of percentage of women.

7. The above-mentioned action by the Appointing Authority unnecessarily trammeled plaintiff's interests and had the effect of creating an absolute bar to his promotion to the position of Road Dispatcher.

8. The Affirmative Action Plans are not in accord with 29 C.F.R. part 1608 *et seq.*, the EEOC guidelines as to appropriate Affirmative Action Plans under Title VII of the Civil Rights Act of 1964, as amended.

9. The record before this Court, as the foregoing discussion indicates, establishes that plaintiff is entitled to relief.

10. Defendant is hereby ORDERED to appoint plaintiff to the position of Road Dispatcher and is FURTHER ORDERED to pay to plaintiff all forms of compensation and benefits which he has not received as a result of his not being appointed to the position of Road Dispatcher in June, 1980.

11. Defendant is enjoined from any further discriminatory acts or practices against plaintiff.

12. Plaintiff is awarded his costs and reasonable attorney's fees to be determined at a future date.

The issue of reasonable attorney's fees is ORDERED bifurcated, to be heard and determined at the convenience of Court and counsel.

DATED: July 23, 1982.

/s/ William A. Ingram
United States District Judge

FOOTNOTE

[1] "Q. In your mind is—when will the Affirmative Action Plan in connection with women not be applicable to the Transportation Agency as a whole, if ever?

A. The broader goal of affirmative action is something which, as far as I'm concerned, is a permanent part of the agency's basic operating philosphy [sic].

So the broader goal is divorced, if you will, from specific numbers or percentages. In terms of the desire to hire, to promote, to give opportunity and training on an equitable, non-discriminatory basis as part of our operating philosophy, that is a permanent part.

Q. Right. And that would include white males?

A. Yes.

Q. And they would be treated exactly the same as the protected groups?

A. I would like to get to the point where everybody in the agency has, in true fact, equal opportunity. A [sic] protected groups certainly, at this point, have to have an opportunity.

Q. So you can't tell me when—any given time, reference to statistics, that everyone will be treated the same in terms of promotional opportunities without reference to an Affirmative Action Plan.

A. Well as long as we have an Affirmative Action Plan, that obviously is what's going to govern. No, I can't give you a specific time table."

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL E. JOHNSON,	)	
	)	
Plaintiff-Appellee,	)	No. 83-1532
	)	
v.	)	
	)	
TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA,	)	D.C. No. C-81-1218-WAI (SJ)
	)	
Defendant-Appellant,	)	
	)	OPINION
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,	)	
	)	
Intervenor-Appellee.	)	
	)	

Appeal from the United States District Court
for the Northern District of California
Hon. William A. Ingram, Presiding

Argued and Submitted: February 14, 1984

BEFORE: WALLACE, FLETCHER, and FERGUSON, Circuit Judges

FLETCHER, Circuit Judge:

Plaintiff alleges that he was denied promotion on account of his sex, in violation of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e *et seq.* The district court rejected defendant's contention that it acted lawfully pursuant to a bona fide affirmative action plan. The district

court granted retroactive promotion and pay and enjoined defendant from further discrimination against plaintiff.

We conclude that the district court misapprehended the requirements for a bona fide affirmative action plan. Guided by *United Steelworkers of America, AFL-CIO-CLC v. Weber,* 443 U.S. 193 (1979), we hold that defendant's affirmative action plan was valid and that defendant acted lawfully pursuant to the plan. We reverse.

I

Defendant is the Santa Clara County Transportation Agency (Agency). Established and maintained by the County of Santa Clara, California, the Agency is an employer within the meaning of Title VII, 42 U.S.C. § 2000e (b).

Plaintiff Paul E. Johnson has been employed by the Agency since 1967. For eleven years, he worked as a road yard clerk. In 1979, when Johnson was a road maintenance worker, the Agency announced an opening for a road dispatcher. A dispatcher allocates crews, equipment, and materials among the various road maintenance jobs in Santa Clara County. Johnson had experience as a temporary road dispatcher for the Agency, as well as with a private company before his employment by the county.

Johnson and eight others applied for the dispatcher position. Seven applicants achieved the required 70 or above on an examination given by a two-member oral board. Johnson tied for second with a score of 75. Diane D. Joyce, the only female applicant, placed fourth on the examination with the third highest score of 72.5, rounded to 73. Like Johnson, Joyce was a long-time Agency employee with

considerable experience as road yard clerk, a road maintenance worker, and a part-time road dispatcher.

Employees of the Agency's Road Operations Division conducted a second, departmental oral board for the seven applicants who successfully completed the first board. The examiners unanimously recommended Johnson for the dispatcher position. Meanwhile, Joyce informed the County Women's Coordinator that she was ranked fourth on the dispatcher eligibility list. The Women's Coordinator informed the Agency's Affirmative Action Coordinator that Joyce had applied. The Affirmative Action Coordinator recommended to the Agency Director that Joyce be appointed. The Director appointed Joyce to the position of road dispatcher.

The Director promoted Joyce under the Agency's voluntary, non-collectively bargained, affirmative action plan dated December 18, 1978 (plan). The plan did not set quotas in any job classification. Rather, the plan established a long-range goal to attain a work force whose composition in all major job classifications approximated the distribution of women, minorities, and handicapped persons in the County labor market. The plan specified no past discriminatory Agency practices; it simply stated that women had been traditionally underrepresented in the relevant job classifications and recognized an extreme difficulty in increasing "significantly the representation of women in certain of those technical and skilled-craft jobs." In 1978, both of the road dispatchers were men. In fact, not one of the Agency's 238 skilled craft positions was held by a woman.

Johnson complained to the EEOC. He received a right-to-sue letter from the EEOC in March 1981 and sued the Agency. Johnson challenged the Agency's failure to promote him to the position of road dispatcher, in favor of a less qualified woman, solely as a violation of Title VII.[1]

Neither party denied that the examination process was fair and in accord with Merit System Rules derived from the county charter. Based upon the examination results and the departmental interview, the district court found that Johnson was better qualified for the dispatcher position that Joyce. The court found further that, but for his sex, Johnson would have been promoted to the road dispatcher position, and, but for her sex, Joyce would have not been so promoted. The court concluded that the Agency's refusal to promote Johnson violated Title VII.

The district court rejected the Agency's defense that its actions were justified by its adherence to the Agency affirmative action plan. The court held that the Agency had failed to meet its burden of producing evidence that adherence to the plan was justified under *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979). Specifically, the court held that the Agency failed to show that its plan was temporary and remedial rather than permanent and designed to maintain a particular balance. As a result, the court concluded, the Agency's actions unnecessarily trammeled Johnson's in-

terests and had the effect of creating an absolute bar to his promotion to the road dispatcher position. While the district court stressed that its decision was based upon the Agency's failure to satisfy the requirement that the plan be temporary, the court also expressed considerable doubt that the plan was appropriately designed to break down entrenched patterns of discrimination.[2]

The district court ordered retroactive promotion of Johnson, awarded him back pay based on the promotion, and enjoined the Agency from further discrimination against him. The Agency appeals from the judgment of unlawful discrimination. We have jurisdiction under 28 U.S.C. § 1291.

II

In *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979), the Supreme Court held that Title VII does not forbid private employers and unions from agreeing to the voluntary adoption of a bona fide affirmative action plan aimed at eliminating racial imbalance in traditionally segregated job categories. The Court observed that the prohibition against racial discrimination in Title VII must be examined in light of the legislative history of the Act and the historical context from which it arose. *Id.* at 201. The primary goal of Title VII was the integration of blacks into the economic mainstream of American society. *Id.* at 202. Not only was the statute itself intended to be remedial, but Congress also hoped that Title VII would "create an atmosphere conducive to voluntary or local resolution of other forms of discrimination." H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963), cited in *Weber*, 443 U.S. at 204. The Court concluded that

> [i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Id. (citation omitted).

Although *Weber* enthusiastically endorsed private-sector affirmative action, the Supreme Court recognized the need for limitations. As the Eighth Circuit has said, courts must "ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action." *Setser v. Novack Investment Co.*, 657 F.2d 962, 968 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981). The Court has yet to "define in detail the line of demarcation between permissible and impermissible affirmative action plans," but the Court noted several aspects of the *Weber* plan that placed it "on the permissible side of the line." *Weber*, 443 U.S. at 208. The plan (1) was designed to break down old patterns of racial segregation and hierarchy, (2) did not unnecessarily trammel the interests of white employees, (3) did not create an absolute bar to the advancement of white employees, and (4) was a temporary measure, "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Id.*

In *LaRiviere v. EEOC*, 682 F.2d 1275 (9th Cir. 1982), we applied *Weber* to an affirmative action program implemented by a public employer to remedy long-standing male-female imbalance in the work force. We determined that the plan to hire and train women as California Highway Patrol traffic officers satisfied the *Weber* guide-

lines. *Id.* at 1280. Thus, the plan could "be utilized consistently with Title VII without giving rise to liability to applicants who are excluded from the program solely because they belong to the opposite sex." *Id.*

A careful examination of the record in this case and of the opinion below persuades us that the district court adopted an overly restrictive view of *Weber*. We conclude that the Agency affirmative action plan contains the same characteristics that the Supreme Court relied upon in upholding the *Weber* plan. The Court observed that "[t]he purposes of the [*Weber*] plan mirror those of the statute." 443 U.S. at 208. We conclude that the purposes of the Agency plan also mirror those of Title VII.

Because the district court based its decision on its perception that the plan was not a temporary measure, we begin there. The district court found that "[t]he Affirmative Action Plan had no end date or other provision which would have the effect of ending preferential treatment to women." The court cited the 1978 Agency plan, the 1979 county plan, and the testimony of James Graebner, the Agency Director.

While the Agency plan contains no date certain or other express statement of fixed duration, it also contains no statement that it is intended to be permanent. Moreover, the entire focus of the plan is on "attaining," rather than maintaining, balance. The Agency plan, like the county plan, repeatedly speaks of "attainment." Part IV states: "The Agency long-range goal is to attain a work force whose composition in all job levels and major job classifications approximates the distribution of women, minority and handicapped persons in the Santa Clara County work force." The plan sets forth percentage long-

range goals for the "attainment of equitable representation." Unlike the district court, we believe that this emphasis upon the "attainment" of a representative work force does "have the effect of ending preferential treatment to women" once parity is achieved.

The district court was persuaded, in part, by Graebner's testimony that affirmative action "is a permanent part of the agency's basic operating philosophy" and even to the effect that the Agency plan will never end. Graebner's testimony must be considered in conjunction with the plan itself, however, with its emphasis on "attainment." Read in context, Graebner's testimony is no more than an expression of the Agency's long-range commitment to affirmative action, and certainly not the expression of an Agency policy to continue the program beyond the point that the law allows. Graebner's own preface, printed at the front of the Agency plan, speaks repeatedly of "attainment" of a representative work force and of the plan's objective "to correct . . . deficiencies."

Plans like this one are usually voluntarily adopted by employees [sic] who wish to express and act upon their commitment to social justice. They should not be rigidly interpreted so as to make their validity depend on technicalities in drafting. To do so would only discourage their adoption and encourage litigation. The district court's assumption that *Weber* requires an expressed date certain for termination or some other express provision that would trigger the end of an affirmative action plan was erroneous. The *Weber* Court did not establish a rigid formula for testing the validity of an affirmative action plan. The Court simply noted that one saving aspect of the *Weber* plan was its temporary nature. Undoubtedly,

a plan must end when its remedial function has been served. The fact that the plan must end, however, does not necessitate the inclusion of an explicit ending provision. We read *Weber* to require that a plan be temporary in the sense that it must end when its goals of parity are met. In that regard, we note a fundamental difference between the Agency plan and the *Weber-LaRiviere* type of plan. In *Weber,* a fixed percentage (50%) of openings in an in-plant craft-training program was reserved for black employees, in order to hasten achievement of the long-term percentage goal (39%) for black representation in the job category. Similarly, in *LaRiviere* a fixed percentage (50%) of the openings in a pilot study, designed to determine the feasibility of employing female traffic officers, was reserved for women. In both cases, the requirement that a fixed percentage of openings be filled by minorities necessitated a reasonably explicit deadline.[3] By contrast, although the goal of the Agency plan here is also to achieve parity, the plan does not establish fixed percentages for hiring, training, or promotion. Rather, the plan allows flexibility in working towards the long-range goals, with special emphasis on recruitment, selection, training, and promotion of minorities, women, and the handicapped.

We conclude that the Agency plan is sufficiently temporary. To paraphrase *Weber,* the plan is not intended to maintain male-female balance, but simply to eliminate a manifest male-female imbalance. Implicit in the plan is the intent to stop taking sex into account once the long-range percentage goals are attained. Nothing in the plan indicates a contrary intent. Nor is there evidence that parity had already been achieved when Joyce was appointed and that the plan was being used improperly to maintain

balance in numbers of each sex. Quite the opposite is true. When Joyce was promoted to road dispatcher, the Agency's 237 other skilled craft positions were all held by men.

Like the *Weber* plan, the Agency affirmative action plan is a remedial effort intended to break down entrenched patterns of discrimination. The Agency plan contains extensive statistics illustrating the underrepresentation of women, minorities, and the handicapped in various Agency job categories. The plan acknowledges "entrenched patterns in hiring and promotion" and recognizes the particular difficulty of achieving parity in upper-level positions when discriminated groups have been traditionally excluded from trainee-level jobs.

In order to demonstrate that its plan is remedial, an employer need not show its own history of purposeful discrimination.[4] It is sufficient for the employer to show a conspicuous imbalance in its work force. *See Setser v. Novack Investment Co.*, 657 F.2d at 968. This is well illustrated by *Weber*, in which the employer hired as craftworkers only persons who had previous craft experience. Because blacks had historically been excluded from craft unions, few had previous craft experience and, consequently, few were hired. *Weber*, 443 U.S. at 198-99. Although the employer did not engage in purposeful discrimination, only 1.83% of the employer's skilled craft workers were black. Because the local work force was 39% black, the employer was justified in adopting an affirmative action plan.

Statistics are extremely useful in showing a conspicuous work force imbalance. We note particularly the difficulty that may confront an employer whose plan is in-

tended to remedy discrimination resulting from societal norms. Some forms of discrimination are so subtle or so accepted that they defy proof other than by statistics. In *Weber,* the exclusion of blacks from craft unions was so pervasive as to warrant judicial notice. *Weber,* 443 U.S. at 198 n. 1.

The promotion of Joyce to the road dispatcher position aptly served the Agency plan's remedial purpose. Statistics contained in the plan show that not one of the Agency's 238 skilled craft workers was a woman. Included in the skilled craft category are mechanics, body and fender repairers, construction inspectors, road maintenance workers, and road dispatchers. A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation. The promotion of Joyce was a lawful attempt to remedy the conspicuous imbalance.

Weber also warns that a plan must not create an absolute bar to the advancement of other employees or unnecessarily trammel the interests of other employees. 443 U.S. at 208. The more closely a plan adheres to its remedial purpose, the less likely it is that the plan will unreasonably infringe upon the interests of other employees. *See Setser,* 657 F.2d at 968.

The affirmative action plan in *Weber* did not deprive white employees of opportunities for advancement, but created additional opportunities by establishing a *new* training program for both blacks and whites. *Weber,* 443 U.S. at 198. Thus, although black employees received training in preference to senior white employees, the ex-

pansion of opportunities previously limited by seniority prevented undue infringement upon non-minority interests. While the *LaRiviere* plan did not necessarily create new openings, it did admit both male and female applicants. As in *Weber,* the *LaRiviere* plan reserved 50% of the openings in the program for applicants from the discriminated group.

While the Agency plan does not establish specific programs for recruitment, hiring, training, or promotion, it does lay a solid foundation for affirmative action. It assigned tasks and presents timetables for achieving long-range and short-range employment goals. The import of the plan, as with any lawful affirmative action plan, is to give preference to members of underrepresented groups. The plan does not indicate, however, that other employees will be barred or that their interests will be unnecessarily infringed. In fact, as in *Weber,* the plan contemplates the expansion of opportunity for all. Shortly before the plan was adopted, the county approved 734 new Agency positions to support the expansion of the county bus fleet from 236 to 516 buses. The plan notes that "[a]s the County Transit System continues to expand, additional positions will need to be authorized."

Johnson argues that the selection of Joyce as road dispatcher served as a complete bar to his selection for the position. We reject this narrow view. The instant case differs markedly from *Weber* and *LaRiviere* in that it does not involve the admission of numerous applicants into a training program. Rather, it concerns the selection of one applicant for a single opening. When there is but one opening, the selection of one candidate will necessarily result in exclusion of all others. Unless we are shown

a distinct pattern of exclusion of non-minority candidates from such positions, we cannot conclude that a single employment decision serves as a bar or unnecessarily trammels the interests of other employees. The record contains no evidence of such a pattern in this case. Pursuant to the Agency plan, Joyce's sex was viewed as an additional positive factor in an otherwise qualified candidate. The fact that her sex may have been the decisive factor in the selection of a woman for this particular opening does not indicate that men will always be excluded.

We conclude that the Agency plan, like the *Weber* plan, "falls on the permissible side of the line." We hold that the Agency's selection of Joyce, pursuant to the plan, was a lawful effort to remedy an entrenched pattern of manifest imbalance. We are not unsympathetic to the complaint of Johnson and others before our court that employers' attempts to remedy past discrimination sometimes visit burdens upon individual members of the non-minority group. As the Agency plan recognizes, however, "the mere existence of an opportunity for members of [discriminated] groups to apply for jobs . . . will *not* by itself result in timely attainment of parity for currently underrepresented groups." Affirmative action is necessary and lawful, within the guidelines of *Weber*, to remedy long-standing imbalances in the work force.

REVERSED.

FOOTNOTE

[1] Although there is state action in this case, *see e.g., Virginia v. Rives*, 100 U.S. 313, 318 (1880), Johnson did not challenge the affirmative action plan on equal protection grounds and we do not reach the issue.

[2] The district court's opinion is not entirely clear as to whether it inappropriately placed the burden of persuading the court of the plan's validity on the employer. The Supreme Court's decision in *McDonnell Douglas v. Green*, 411 U.S. 792 (1972) explains the order and burdens of proof in a typical Title VII case. First the plaintiff must present a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 802. Then the employer must articulate a legitimate, nondiscriminatory reason for its decision. *Id.* The plaintiff then must convince the court that the employer's proffered reasons were actually a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 804-05.

We agree with the Eighth Circuit's analysis in *Setser v. Novack Investment Co.*, 657 F.2d 962 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981), which applied the *McDonnell Douglas* formula to an affirmative action case. In order to meet the burden of articulating a nondiscriminatory reason for its hiring decision, the employer need only produce "some evidence that its affirmative action plan was a response to a conspicuous . . . imbalance in its work force" and "some evidence that its affirmative action plan is reasonably related to the plan's remedial purpose." *Setser*, 657 F.2d at 968. Once an employer has produced evidence that its refusal to hire the plaintiff was a consequence of its implementation of the plan, the employer is entitled to judgment unless the plaintiff proves the plan is invalid. *Setser*, 657 F.2d at 962.

We disagree with the dissent's analysis that the employer's assertion that it made its hiring decision pursuant to its affirmative action plan is an affirmative defense imposing a burden of going forward and persuading (as contrasted to a burden of production). However, in this case, the employer has met the higher burden—the plan is bona fide, meets the tests of *Weber*, and responds to a need to correct an overwhelming imbalance in the work force (all of Agency's 238 skilled craft positions were held by men until Joyce was hired, making it 237 to 1).

[3] Yet it is not clear that the *Weber* plan was any more expressly limited than the Agency plan. "The 'Joint Committee' thereafter entered into a 'Memorandum of Understanding' which established a goal of thirty-nine percent as the percentage of minorities that must be represented in each 'craft family' at the Kaiser Gramercy plant." *Weber v. Kaiser Aluminum & Chemical Corp.*, 415 F.Supp. 761, 764 (E.D. La. 1976) (footnotes omitted), *cited in Weber*, 443 U.S. at 199.

[4] Although the district court rejected the Agency plan as a defense on the ground that it was not shown to be temporary, it also expressed doubt as to the plan's remedial intent. This concern hinged upon the court's finding that "[t]he Transportation Agency has not discriminated in the past, and does not discriminate in the present against women in regard to employment opportunities in general and promotions in particular." The district court apparently assumed that an employer must show his own history of purposeful discriminatory patterns or practices.

RE: *Johnson v. Transportation Agency—No. 83-4532*

WALLACE, Circuit Judge, concurring in part and dissenting in part:

This "reverse discrimination" case presents some difficult questions arising from the application of an affirmative action plan. I conclude that the record before us is insufficient to make broad pronouncements of judicial policy. I would vacate and remand this case for two reasons. First, the record suggests that the district court improperly allocated the burdens of persuasion and production between the parties. Second, the court did not make sufficiently detailed findings on the plan to hold it invalid.

I

The facts of this case, referred to in part by the majority, are significant. Johnson, a 58 year-old white male, has lived in Santa Clara for many years. After working 17 years for a cement company, including 7 years as a dispatcher and 8 years as a supervisor, he quit rather than accept a transfer that would uproot his family. Instead, he took a job with the Agency. He worked the better part of 11 years in the position of Road Yard Clerk II, requisitioning road materials for operations, processing purchase orders and arranging material provisions in emergencies. Eventually, however, he concluded that the job offered him little chance for advancement. He requested a voluntary demotion to Road Maintenance Worker II, hoping that the Road Maintenance Division would provide better opportunities for promotion to a position such as road dispatcher.

Agency road dispatchers assign crews, equipment, and materials to road maintenance job sites. They must keep accurate records on the status and availability of workers, materials, and equipment at those sites and need a working knowledge of all those things as well as of the various roads maintained by Santa Clara County. Job candidates usually have four years of experience in either dispatch or road work, and can operate a radio telephone. In 1974, Johnson applied to be a road dispatcher but placed second and failed to get the job. The position re-opened in December 1979, by which time Johnson had gained more road work experience, including several months work "out of class" as a road dispatcher. He and eight others applied for the position. Seven of them scored over the required 70 on the examination given by a two-member oral board on April 24, 1980.

Johnson placed second, with a score of 75. Employees from the Agency's Roads Division then conducted a second oral board for the seven qualifying applicants, and unanimously recommended Johnson for the job. Neither party denied that both the oral boards and the examination process were fair and in accord with Merit System Rules derived from the County charter. Section 7 of that charter prohibits sex discrimination and ensures promotions based on merit and equal opportunity.

Diane Joyce, the woman the Agency ultimately hired instead of Johnson, placed fourth on the examination, scoring 72.5, rounded up to a 73. She had worked as a road maintenance worker for five years and before that a bookkeeper, account clerk, and senior account clerk. She wanted to be a road dispatcher in 1974, but lacked the requisite experience for consideration. During the selection process

in 1980, she contacted the County's Women's Coordinator, Lee, and told her about the job opening. Joyce reported that she had placed low on the eligibility list, however. Lee told Morton, the Agency's Affirmative Action coordinator, about Joyce and Morton recommended Joyce's promotion to Graebner, the Director of the Agency. Graebner then promoted Joyce. It was the only time he had ever directly made a promotion decision within the Roads Operation Division. Without Morton's recommendation, one of Graebner's subordinates would have made the road dispatcher appointment.

Graebner promoted Joyce under a voluntary, non-collectively bargained affirmative action plan dated December 18, 1978 (plan). The plan set no "quotas," *per se,* in any job classification, but rather had long-range percentage goals aiming at some numerical parity with women available in the local labor market. It specified no past discriminatory Agency practices, identified no history of purposeful exclusion it sought to remedy, and did not follow Equal Employment Opportunity Commission (EEOC) guidelines, *see* 29 C.F.R. § 1608.1-.12 (1983). It simply stated that the relevant job classifications had traditionally underrepresented women, and recognized an extreme difficulty in increasing "significantly the representation of women in certain of those technical and skilled-craft jobs." When Graebner promoted Joyce under the plan, he did not carefully inspect the applications and related examination records of Joyce and Johnson, as the County's Merit System Rules authorized him to do. He thought he simply retained discretion to pick from among the top candidates who had crossed a certain threshold of ability.

II

In Title VII cases, "the ultimate question" is "discrimination *vel non.*" *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 (1983) (*Aikens*). The existence of an affirmative action plan does not change this essential inquiry.

Title VII plaintiffs may challenge promotion decisions under either disparate treatment or disparate impact theories. Johnson asserts only a disparate treatment claim of the classic Title VII kind: the Agency intentionally and unjustifiably treated him differently only on the basis of his sex. "The 'factual inquiry' in a Title VII case is '[whether] the defendant intentionally discriminated against the plaintiff.'" *Aikens*, 460 U.S. at 715, *quoting Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Of course, the fact that Johnson is a white male is irrelevant to his quantum of protection under Title VII. *E.g., McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280 & n. 8 (1976). "[A] plaintiff's ultimate burden of persuasion remains the same regardless of race [or sex]: he must prove that the defendant intentionally discriminated against him." *Lanphear v. Prokop*, 703 F.2d 1311, 1315 (D.C. Cir. 1983).

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (*McDonnell Douglas*), the Supreme Court first comprehensively addressed "the order and allocation of proof in a private non-class action challenging employment discrimination." *Id.* at 800. At the time, and later, the Court recognized that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof . . . is not necessarily applicable in every respect to differ-

ing factual situations." *Id.* at 802 n. 13, *quoted in Furnco Construction Corp. v. Waters,* 438 U.S. 567, 575-76 (1978) (*Furnco*). The three stages of proof presentation and burden shifting under *McDonnell Douglas* entail no trifurcation of trial, but simply provide courts with "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco,* 438 U.S. at 577; *see generally* B. Schlei & P. Grossman, *Employment Discrimination Law* 1321-22 (2d ed. 1983).

A Title VII plaintiff carries "the initial burden under the statute of establishing a prima facie case of racial discrimination." *McDonnell Douglas,* 411 U.S. at 802. Johnson had to show that sex was the likely reason for the denial of his job opportunity. *See Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-53 (1981) (*Burdine*); *Hagans v. Andrus,* 651 F.2d 622, 625 (9th Cir.), *cert. denied,* 454 U.S. 859 (1981); *White v. City of San Diego,* 605 F.2d 455, 458 (9th Cir. 1979). When this burden is met by the employee, it "creates a rebuttable 'presumption that the employer unlawfully discriminated against' him." *Aikens,* 460 U.S. at 714, *quoting Burdine,* 450 U.S. at 255.

At this juncture of the *McDonnell Douglas* analysis, the question arises whether the use of an affirmative action plan to rebut a charge of employer discrimination is properly part of the plaintiff's prima facie case or whether it should be considered as a separate affirmative defense subsequent to *McDonnell Douglas* analysis. If analyzed under the traditional *McDonnell Douglas* test, once a Title VII plaintiff establishes a prima facie case, "[t]he burden then must shift to the employer to articulate some legiti-

mate, nondiscriminatory reason" for the actions that inspired the complaint. *McDonnell Douglas,* 411 U.S. at 802. To rebut the presumption against him, therefore, the employer must "*produc*[*e*] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason." *Burdine,* 450 U.S. at 255, *quoted in Aikens,* 460 U.S. at 714 (emphasis added). The only burden shifted to the employer is the burden of going forward with evidence that suggests a legitimate defense of his actions. Meeting this burden puts the trier of fact "in a position to decide the ultimate factual issue in the case." *Aikens,* 460 U.S. at 715; *see also Knutson v. Boeing Co.,* 655 F.2d 999, 1001 (9th Cir. 1981) (employee retains the ultimate burden of showing intentional discrimination.)

Under a *McDonnell Douglas* analysis, one legitimate reason an employer may offer to rebut the discrimination presumption, and fulfill his burden of going forward, is a bona fide affirmative action plan. *See, e.g., Hunter v. St. Louis-San Francisco Railway Co.,* 639 F.2d 424, 426 (8th Cir. 1981). The employer must articulate the reasons for rejection clearly, and do so through admissible evidence. *See Burdine,* 450 U.S. at 255 & n. 9, 257-58. When the employer has articulated a reason and rebutted the employee's prima facie case, "the factual inquiry proceeds to a new level of specificity." *Burdine,* 450 U.S. at 255. The employee must have an "adequate 'opportunity to demonstrate that the proffered reason was not the true reason for the employment decision,' but rather a pretext." *Aikens,* 460 U.S. at 716 n. 5, *quoting Burdine,* 450 U.S. at 256; *see McDonnell Douglas,* 411 U.S. at 807. As long as the employee has this opportunity, the trial court must then

decide whether there has been impermissible discrimination.

In this case, the Agency offered an affirmative action plan and other evidence to rebut the presumption that its decision was sex-based. Mere presentation or articulation of any plan, of course, will not rebut the presumption. The employer must show sufficient facts suggesting a legal, bona fide affirmative action plan meeting the minima defined in *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193 (1979) (*Weber*), and the law of our own circuit applying *Weber, La Riviere v. EEOC*, 682 F.2d 1275 (9th Cir. 1982). The plaintiff's only Title VII burden of persuasion is to prove discrimination. He need not prove the illegality of an affirmative action plan merely alleged by his employer, or one for which his employer has not produced evidence to meet the prima facie requirements of a bona fide plan. The employer's burden is to go forward with evidence of a legal plan, and it is in his best interest carefully to present the fullest evidence possible.

There is an alternative way to analyze an affirmative action plan: as a separate affirmative defense raised by the employer. This is not a distinction without a difference. The burden of proof under the *McDonnell Douglas* test never shifts from the plaintiff. The burden of proof to demonstrate the validity of a separate affirmative defense rests with the person asserting it: the employer in Title VII cases. It is logical to require the employer to prove the validity of its plan since it is the employer's plan that has allegedly caused a Title VII injury.

The statute already provides a similar type of analysis for one aspect of sex discrimination. Title VII provides a narrow exception that allows classifications or treatment based on sex, but only if sex is "a bona fide occupational qualification reasonably necessary" to an employer's operation. 42 U.S.C. § 2000e-2(e)(1). That statutory exception takes the form of an affirmative defense for the employer: if the court disbelieves his proffered reasons, he may admit discrimination between employees on the basis of sex but argue that the discrimination was justified. *See generally* K. Davidson, R. Ginsburg & H. Kay, *Sex-Based Discrimination* 667-95 (1974); Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification,* 55 Tex. L. Rev. 1025 (1977).

Thus, if affirmative action plans are presented as affirmative defenses, the burdens of going forward and persuasion dictated by Supreme Court and Ninth Circuit precedent form a simple and logical framework for deciding these difficult issues. This approach seems to me to provide a better means of analyzing affirmative action plans.

The majority does not discuss this problem, but concludes without analysis that the employer need only show "some evidence" that the plan was in response to a conspicuous work force imbalance and that the plan is reasonably related to the plan's remedial purposes. (Maj. op. at p. 15 n.2.) Then the plaintiff must prove the plan is invalid. I disagree with this analysis. In addition, all that is required by the majority's holding is to vacate the judgment to allow the district judge to apply these new pronouncements on burdens of proof and persuasion. The

subsequent broad pronouncements on whether the plan passes muster under *Weber* are premature.

The record does not indicate clearly whether the district court properly allocated the burdens of going forward and persuasion. Therefore, the record is sufficiently suspect that I would have remanded this case for the proper application of those burdens, and for consideration of the Agency plan as an affirmative defense.

III

The second reason that I write separately is because the district court made insufficient findings on the Agency's affirmative action plan to justify its rejection of the plan.

Title VII embodies a broad legal principle of anti-discrimination. In *Weber,* the Supreme Court held that Title VII does not necessarily preclude voluntary, private affirmative action, and thus carved out a very narrow exception to that principle: it rejects random discrimination against various minorities or whites or males, but allows planned discrimination under very limited circumstances. *See* 443 U.S. at 200. In *La Riviere,* we did not address the constitutional issue but applied *Weber* to a voluntary, *public* affirmative action plan. In each case the result is to sanction some discrimination not otherwise legally conscionable—because based on race or sex—when it aims to remedy purposeful past discrimination.

Courts, however, must be careful to "ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action." *Setser v. Novack*

Investment Co., 657 F.2d 962, 968 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981). The bona fides of affirmative action plans must be evaluated carefully if the employer asserts he has treated plaintiff pursuant to one, because Title VII compels us to consider the rights of individuals, not groups. *See, e.g., Connecticut v. Teal*, 457 U.S. 440, 453-54 (1982); *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978).

Two overarching questions guide the analysis of plans: "(1) when it is permissible to initiate an affirmative action plan, and (2) what methods may be employed to prefer one race [or sex] over another." *Setser*, 657 F.2d at 967 n.4. Although *Weber* did not exclusively "define in detail the line of demarcation between permissible and impermissible affirmative action plans," 443 U.S. at 208, it identified at least four factors which *La Riviere* adapted to public plans. The plan: (1) must aim at breaking down historic patterns of racial or social segregation and hierarchy; (2) may not unnecessarily trammel the interests or employment opportunities of other employees; (3) must not absolutely bar the advancement of other employees; and (4) must remain only a temporary measure aimed at manifest racial or social imbalances. *La Riviere*, 682 F.2d at 1279-80, *citing Weber*, 443 U.S. at 208.

The majority evaluated the Agency's plan in light of the four factor test and concluded that the plan was valid. Since a plan must pass muster under all four factors, a separate analysis of each factor is necessary.

A.

The first question is whether the plan breaks down historic patterns of discrimination. The majority con-

cludes that the Agency's plan was remedial, relying solely on the imbalance in the work force. Although I agree that statistics are useful and probative on this issue, a statistical imbalance should not suffice to satisfy this prong of *Weber*. An employer should use an affirmative action plan not only for identifying and making whole victims of discrimination, but also to identify and change the discriminatory organizational practices and conditions that initially produce victims. *See United States Commission on Civil Rights, Affirmative Action in the 1980s: Dismantling the Process of Discrimination* 41 (1981) (Commission Report); *cf. Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576, 2588 (1984) (courts can override seniority systems only for each member of minority plaintiff class who was an actual victim of the discriminatory practice and on whom the practice had an individual impact); *see generally* 29 C.F.R. § 1608.4 (1984). Thus, plans must arise in a remedial context: they must respond to a deep historical problem, rather than to random, insensitive acts of individuals over the years. *See, e.g., Weber*, 443 U.S. at 198 n.1 (citing deliberate racial exclusion as a legitimizing precondition for affirmative action plans in the construction industry, among others.)

A judicial inquiry demands no official, administrative or judicial determination of discrimination. *See Local Union No. 35 v. City of Hartford*, 625 F.2d 416, 422 (2d Cir. 1980), *cert. denied*, 453 U.S. 913 (1981). Nevertheless, the employer must be able to point to past or present discriminatory patterns and practices that created the traditional segregation of the job categories in question. Merely "arguable" violations are not enough. *Cf. Weber*,

443 U.S. at 211 (Blackmun, J., concurring). Past discrimination implies some discriminatory cause for the present underrepresentation in the employer's job category and allows the court to go beyond the effects of socially created, accidental differences. Remedies affect causes; as a remedy, a plan must bear a relationship to the causes of discrimination so that it can change the discriminatory organizational practices that initially created victims. *See, e.g.,* Commission Report, *supra,* at 41.

In this regard, statistics that show a conspicuous work force imbalance help greatly: they function as quantitative clues that "raise questions rather than settle them" and pinpoint areas requiring "further investigations into the factors that produce the statistical profile." Commission Report, *supra,* at 36. These statistical studies, of course, should adjust for demographically relevant variables in their comparisons between the work force and local labor pool. *See, e.g., United States v. City of Miami,* 614 F.2d 1322, 1352-53 & n.5 (5th Cir. 1980) (Gee, J., dissenting), *modified on other grounds,* 664 F.2d 435 (1981) (en banc). Because plans are remedial, however, an employer cannot rely on statistics alone as a short-cut around the critical need for causal evaluation and analysis. *See* Commission Report, *supra,* at 36. Therefore, I consider the majority's approach too superficial for the analysis required under the first prong of *Weber,* and disagree with it.

B.

The second inquiry is whether the plan unnecessarily trammels the interests of non-minority employees. A bare affirmation that the more reasonably the plan relates to

its remedial purpose in specifics, *see, e.g., Ende v. Board of Regents of Northern Illinois University,* 565 F. Supp. 501, 507 & n. 3, 509 (N.D. Ill. 1983), the less chance it will so invade "the interests of majority workers that it violates Title VII," *Parker v. Baltimore & Ohio Railroad Co.,* 652 F.2d 1012, 1016 (D.C. Cir. 1981), is insufficient. We must scrutinize carefully the reasonableness of the plan's measures to prevent the majority employees from having their "rights . . . bartered away by the employer in order to buy his private peace." *City of Miami,* 614 F.2d at 1352 n. 3 (Gee, J., dissenting). At the most obvious level, therefore, a plan may not simply "require the discharge of white workers and their replacement with new black hirees." *Weber,* 443 U.S. at 208; *accord La Riviere,* 682 F.2d at 1279. More generally, the plan may not unnecessarily close off channels of employment to non-minorities. *See Parker,* 652 F.2d at 1014. A court's serious evaluation of a plan's measures can settle such questions as whether it in reality uses a "quota" rather than a "goal," and can establish the reasonableness of the plan with respect to non-minority employees. The record does not demonstrate such an inquiry. Therefore, I conclude that the majority is not in a position to pass on this issue.

C.

The third issue to be addressed is whether the plan absolutely bars the advancement of non-minority employees. This inquiry is closely related to the one above, and the answer will depend on several factors, including the number and nature of the applicants, the number of contested jobs available, and employee expectations. The affirmative action program in *Weber* did not deprive white

employees of opportunities for advancement, but created new opportunities by establishing a training program for both blacks and whites. *Weber,* 443 U.S. at 198. Thus, although "black employees' receiv[ed] training in preference to senior white employees," *id.* at 199, the expansion of opportunities previously limited by seniority prevented any problem. *See also La Riviere,* 682 F.2d at 1280. Under *Weber,* the safest plans minimize non-minority employee displacement and do not concentrate the costs of affirmative action "upon a relatively small, ascertainable group of non-minority persons." *EEOC v. Local 638,* 532 F.2d 821, 828 (2d Cir. 1976); *cf.* Gewirtz, *Remedies and Resistance,* 92 Yale L.J. 585, 605 (1983) (effective remedies must operate within third-party cost constraints). The district court did not analyze this issue sufficiently, and I would have remanded this case for a more detailed consideration.

D.

The final question is whether the plan remains only a temporary measure. The majority concluded that the plan was temporary because it did not state expressly that it would be permanent, and purported to *attain* rather than to *maintain* a sexual balance. Thus, the majority concludes that *Weber* endorses all plans which do not admit to being permanent, but which end when their goals are met. This interpretation of *Weber* is too broad, and reads the temporary requirement out of the test by making it a hurdle over which any artfully drawn plan can jump. The saving grace of the plans in *Weber* and *La Riviere* was their expressly temporary duration. *See Weber,* 443 U.S. at 208-09; *La Riviere,* 682 F.2d at 1280. Moreover, a broad

reading of *Weber* is unnecessary in this case. The disputed facts in the record, particularly Graebner's testimony, does not justify the majority's conclusion that the plan was temporary. An appellate court is not in a position to make this factual determination. The district court should have the opportunity to weigh this evidence properly, and I would remand this case for further factual hearings.

IV

In conclusion, the record demonstrates that the district court evaluated the Agency's 1978 plan, although it did consider newer Agency and county-wide plans. The relevant plan, of course, is the one the Agency applied to the allegedly adverse employment decision. I would have remanded this case for the district court to reconsider the plan as an affirmative defense of the Agency under the proper allocation of burdens discussed above. The district court then should have reviewed the aspects of the appropriate plan under a detailed *Weber* analysis to create an appropriate record for review. *See Parker,* 652 F.2d at 1020; *cf. Pullman-Standard v. Swint,* 456 U.S. 273, 291 (1982) (when "a district court has failed to make a finding because of an erroneous view of the law, . . . there should be a remand for further proceedings to permit the trial court to make the missing findings").

I concur in the result reached by opinion because I believe that the district court erred by misallocating the burdens of persuasion and proof, and a judgment based on such a record should not stand. I cannot join this opinion, however, because I disagree with the majority's allocation of the burdens of persuasion and production, and because I believe that the district court should have the first oppor-

tunity to correct its own errors and conduct the intensive factual analysis necessary to resolve these issues. In order for the majority to uphold the plan, it has taken several unnecessary doctrinal steps that weaken the Supreme Court's test in *Weber* as interpreted by *La Riviere*. From these pronouncements, I dissent.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL E. JOHNSON,	)	
	)	
Plaintiff-Appellee,	)	No. 83-1532
	)	
v.	)	
	)	
TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA,	)	D.C. No. C-81-1218-WAI (SJ)
	)	
Defendant-Appellant,	)	ORDER FOR PUBLICATION
	)	
and	)	
	)	
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,	)	
	)	
Intervenor-Appellee.	)	
	)	

Before: FLETCHER and FERGUSON, Circuit Judges

The majority opinion in this case, filed December 4, 1984, is amended as follows:

Slip op. at 5196, column 2:

Delete the first sentence of the third full paragraph "While the Agency . . . permanent." Replace it with the following:

> The duration of the plan, however, while subject to factfinding by the district court, is only one factor in determining that a plan "is not intended to maintain . . . [sexual] imbalance." *Weber*, 443 U.S. at 208. Permanent maintenance

is simply one potentially impermissible factor to be used in determining the validity of an affirmative action program; elimination or attainment is one permissible factor.

The Agency plan clearly aims at attainment. The district court correctly found that the plan contains no date certain or other express statement of fixed duration. The plan, however, also contains no statement that it is intended to be permanent. Enforcing it to change the male-female ratio in the skilled trades from 238 to zero, to 237 to one, clearly falls on the attainment side of the line.

Continue the paragraph with "Moreover,".

Slip op. at 5198, n.4:

Add to the end of the footnote:

An employer need not make any such showing. Thus, the district court's factual finding of no past or present discrimination against women by this employer is irrelevant to the issue of the validity of the affirmative action program.

Slip op. at 5198, column 1:

Immediately after n.4 in text, add:

"[A] judicial determination of . . . discrimination is not a prerequisite to an employer adopting voluntary, . . . [sex]-conscious remedies to comply with Title VII." *Busher v. New York State Civil Service Commission*, 733 F.2d 220, 228 n.11 (2d Cir. 1984), *cert. denied*, No. 84-336 (Jan. 7, 1985) (referring to race-conscious plans).

Slip op. at 5199, column 1:

At the end of the partial sentence at the top of the page, add footnote 5, that reads:

5. Citing Justice Blackmun's concurrence in *Weber*, the dissent contends, "Merely 'arguable' violations are not enough" to warrant affirmative

> action. The dissent misstates the law and incorrectly cites both the *Weber* plurality and Justice Blackmun's concurrence. Justice Blackmun actually wrote separately to *endorse* the theory that "voluntary affirmative action be a reasonable response to an 'arguable violation' of Title VII." 443 U.S. at 211. His position was narrower than the plurality's, not broader: "The Court, however, declines to consider the narrow 'arguable violation' approach and adheres instead to an interpretation of Title VII that permits affirmative action by an employer whenever the job category in question is 'traditionally segregated.'" 443 U.S. at 212. Two hundred and thirty eight to zero suffices to show such segregation.
>
> However, were a showing of arguable violation required, we suggest that two hundred and thirty-eight to zero suffices to show that too (were Ms. Joyce the plaintiff here, the job having gone to Mr. Johnson, the statistics would make a prima facie case of discrimination.)

Judges Fletcher and Ferguson voted to deny the petition for rehearing and to reject the petition for rehearing en banc. Judge Wallace voted to grant.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
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Defendant-Appellant,	)	ORDER FOR PUBLICATION
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	)	
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,	)	
	)	
Intervenor-Appellee.	)	
	)	

Before: WALLACE, Circuit Judge

My dissent, filed December 4, 1984, is amended by adding footnote 1, called at slip op. 5205, col. 2, first full paragraph, after "(Blackmun, J., concurring)":

1. The majority accuses me of "misstat[ing] the law and incorrectly cit[ing]" both *Weber* and Justice Blackmun's concurrence. Slip op. at 5199, n. 5. A careful reading of my dissent will demonstrate no misstatement of the law.

   It is true that Justice Blackmun concluded that the *Weber* plurality rejected an "arguable violation" approach in favor of a "traditional segregation" approach. This, however, is precisely my point—that *more* than an "arguable violation" is required. By using the term "*tradition-*

ally segregated job categories," *Weber*, 443 U.S. at 209 (emphasis added) (footnote omitted), the Court incorporated a requirement that a showing of past discrimination must be made. *See Janowiak v. City of South Bend*, 750 F.2d 557, 562 (7th Cir. 1984).

Not only have I correctly cited the law but, to the extent that the majority opinion holds that a mere statistical disparity suffices to show that a job category was "traditionally segregated," it is contrary to both *Weber* and *Janowiak*. Although one may argue whether a finding of two hundred and thirty-eight males to one female suffices to show sex-based segregation, the ratio alone is insufficient to show a pattern of *traditional* sex-based segregation.